Petition

81-732

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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM 1981

LINDA HILL WALTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether, in the absence of a search warrant or exigent circumstances, law enforcement officers may enter the premises of a third party to conduct a "cursory protective sweep" for additional suspects, on the mere possibility that additional suspects may be found therein.

2. Whether a defendant whose demonstration of standing is sufficient under existing law may be denied consideration of her motion to suppress by retroactive application of more stringent standards subsequently announced.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Ninth Circuit

The Petitioner, Linda Hill Walton, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on July 15, 1981.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals is not reported. A copy of the opinion is appended hereto as Appendix A, and a copy of the order denying the petition for rehearing is appended as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on July 15, 1981, affirming Petitioner's conviction dated June 26, 1980. The Court of Appeals denied a timely peti-

tion for rehearing on August 17, 1981, and this petition for certiorari is filed within sixty days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On March 19, 1980, a two-count indictment was filed in the United States District Court for the Northern District of California, charging Linda Hill Walton with separate violations of 18 U.S.C. § 922(h)(1) and (2). In each count it was alleged that Petitioner aided and abetted her husband Sergey Walton, who was then a fugitive from justice and who had previously been convicted of an offense punishable by imprisonment for more than one year, to receive firearms which had been shipped or transported in interstate or foreign commerce.

Following the entry of her plea of not guilty, Petitioner moved to suppress the evidence seized from the premises known as the Bay Area Auto Repair Shop, on or about October 23, 1979, on the grounds, inter alia, that the initial police entry without warrant into the premises was unconstitutional, and that the search warrant eventually obtained authorizing full search of the premises was not supported by probable cause.

The facts underlying the motion to suppress were the following:

On October 22, 1979 agents of the federal Bureau of Alcohol, Tobacco and Firearms received information from an undisclosed source that Sergey Walton was believed to be frequenting the Bay Area Auto Repair Shop in Fre-

mont, California. Walton was the subject of an outstanding federal arrest warrant issued June 13, 1979 following his indictment for violations of various provisions of 18 U.S.C. § 1962. Several other persons named in this indictment had also not been apprehended as of October 22, 1979, but the agents had no information that any other fugitive had at any time been observed in or near the premises.

At approximately 5:35 p.m. agents observed Walton standing outside the door of the premises. Walton, apparently having seen the agents, re-entered the premises and closed the door. The premises were then surrounded, and armed surveillance was maintained at all entry and exit points. The premises were secure for approximately two hours while additional equipment was brought to the scene. At about 7:15 p.m., a police officer placed a phone call to the garage and spoke with Walton. Walton advised that he was alone and that he would voluntarily surrender. At no time during the two hour surveillance did the officers make any observation or receive any indication of the presence of any other persons, fugitives or otherwise, within the premises. Nor did the officers have any facts or information concerning the presence in the premises of any contraband or evidence, or of the attempt by any person or persons therein to remove or destroy any such items. A check of official records disclosed that the premises were not leased by Walton or by any other known fugitive.

In accordance with the agreement made by telephone, Walton exited the garage voluntarily. He was placed under arrest and removed from the area of the garage. Thereupon, some two hours after they had initially surrounded

and secured the premises, law enforcement officers decided to enter the repair shop. The entry without warrant was not thought or intended to be "incident" to the arrest of Walton, nor were the officers aware of any exigent circumstances requiring their immediate entry. Rather, the officers intended to check the inside of the premises for the possibility that other suspects and/or fugitives might be found therein.

Although no facts supported this possibility, a search of the premises did in fact disclose the presence of one other fugitive wanted on the same indictment. It disclosed as well the presence of one single hand grenade. On the basis of this latter observation, after several additional hours, a search warrant was obtained to search the entire premises for evidence of the unlawful possession or manufacture of hand grenades and other explosives. Upon the execution of the warrant agents discovered, among other things, Petitioner's purse which was located on top of a motor home trailer inside the premises. This purse contained a receipt from a gun store which led agents eventually to the discovery that Petitioner had purchased weapons similar to those found in her husband's possession upon arrest. These weapons were the basis of Petitioner's conviction.

In moving to suppress the evidence, Petitioner asserted standing on the ground that the purse was hers, and submitted a declaration of her proprietary interest in the purse and its contents. The veracity of this assertion was not challenged by the prosecution. Nor was Petitioner's standing to object to the seizure and search of her purse challenged. Rather, the prosecution objected

only to Petitioner's attempt to challenge the seizure of certain other items taken from the premises on the ground that she had a community property interest in such items. No further reference was made to the standing issue, and the Government's responsive memorandum addressed all substantive contentions presented by Petitioner. Similarly, the trial court's order denying Petitioner's motion to suppress addressed all substantive contentions, including the legality of the initial entry, then adding "Furthermore, except as to the purse and the items contained therein, Defendant has no standing to challenge the searches and seizures."

On appeal the Government contended for the first time that Petitioner was without standing to challenge the legality of any of the searches and seizures, including the seizure of her purse and its content, relying primarily on the decisions of this Court in *United States v Salvucci*[1] and *Rawlings v. Kentucky*[2] which were rendered on June 15, 1980, one month after the entry of the trial court's order denying suppression. Ruling that Petitioner had not established standing with respect to the premises themselves, the Court of Appeal declined to consider her challenge to the legality of the initial entry underlying the discoveries which resulted in the search warrant. However, the Court did consider the sufficiency of probable cause underlying the warrant for the premises, thus presumably concluding that Petitioner had demonstrated standing to challenge the warrant.

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[1]448 U.S. 83 (1980).

[2]448 U.S. 98 (1980).

REASONS FOR GRANTING THE WRIT

I

CERTIORARI SHOULD ISSUE TO SETTLE THE IMPORTANT QUESTION, UPON WHICH THE CIRCUITS APPEAR TO BE IN CONFLICT, OF WHETHER THE FOURTH AMENDMENT PERMITS ROUTINE PROTECTIVE SWEEPS OF PREMISES FOR ADDITIONAL SUSPECTS FOLLOWING ARRESTS OUTSIDE THE PREMISES

Under the circumstances presented herein, the warrantless entry and search of the premises were plainly not motivated or justified by exigent circumstances (cf., *Michigan v. Tyler*, 436 U.S. 499 (1978)) or as an incident to the lawful arrest of Sergey Walton (cf., *Chimel v. California*, 395 U.S. 752 (1969)), and with commendable candor the prosecution made no attempt to justify the actions under either of these recognized exceptions to the warrant requirement. Rather, the declarations and affidavits of the agents involved, and the Government's memorandum in opposition to suppression, attempted to justify the entry and search as a "protective sweep" of areas and premises beyond the arrested defendant's control on the mere possibility, without substantial supporting facts, that additional suspects might be present. In so doing, the Government has attempted nothing less than the creation of a new exception to the warrant requirement, which is supported neither by precedent nor principle. This purported doctrine is at odds with, and would substantially undermine the principles articulated in leading decisions of this Court, including *Chimel v. California, supra* and *Michigan v. Summers*, ... U.S. ...., 69 L.Ed.2d 340 (1981).

In attempting to advance this proposition, the Government appears to rely on the ambiguity of the language in some appellate opinions which speak of the propriety of "protective sweeps" in a variety of circumstances. Petitioner submits, however, that the majority of cases relied upon do not in fact support the proposition, and that the relatively few Circuit Court opinions which appear to endorse the doctrine are either improperly construed or simply erroneous. In either event, a clear decision by this Court establishing the illegality of the doctrine, and clarifying the parameters of permissible investigative procedures following an arrest in or near private premises is mandated.

The proffered doctrine of "protective sweeps" appears to be a relatively new one, perhaps intended to circumvent the limitations established by the ruling of this Court in *Chimel v. California*. Initially, a number of Circuit Courts firmly rejected the suggestion that law enforcement officers routinely have the right to conduct cursory searches for additional suspects following an arrest. E.g., *United States v. Gamble*, 473 F.2d 1274 (7th Cir., 1973); *United States v. Cooks*, 493 F.2d 668, 672 (2nd Cir., 1974). What these earlier decisions made clear, and what the Government has failed to perceive herein, is that the only justification for the so-called "cursory protective sweeps" is not a new and independent exception to the warrant requirement, but the established exception of exigent circumstances. Thus, the United States Court of Appeals for the Second Circuit reversed a District Court ruling that agents making lawful arrests on business premises had the right

to make a cursory examination of the room in which the defendant was arrested to see if anyone else was present who might threaten their safety or destroy evidence. The Court stated:

> "Unless there are exigent circumstances which would cause the law enforcement agents reasonably to believe that they might be in danger, warrantless security searches of the closed or concealed areas of a room in which an arrest is made, whether the premises be business or residential, are not sanctioned under the Fourth Amendment. Exigent circumstances may exist where the agents have information that the individual arrested is travelling with other armed accomplices or where the agents have reason to believe that the suspects were in the apartment."

United States v. Dien, 609 F.2d 1038, 1047 (2nd Cir., 1979).

Perhaps even more forcefully, the Fifth Circuit has expressly limited the availability of house-wide searches after a proper arrest for the purpose of making a cursory safety check to those situations when "the circumstances [provide], at the least, probable cause to believe that a serious threat to safety [is] presented." *United States v. Smith*, 515 F.2d 1028, 1031 (5th Cir., 1975); *United States v. Cravero*, 545 F.2d 406, 418 (5th Cir., 1976).

Unfortunately, a number of the decisions of other Circuits have appeared less rigorous in their reasoning and less precise in language thus appearing to give support to the Government's contention that protective sweeps may be conducted on mere hunch or mere possibility. Some of these decisions may be distinguished on the grounds that facts

were presented justifying a reasonable belief in the actual presence of armed confederates or others who might endanger the officers (e.g., *United States v. Sellers*, 520 F.2d 1281, 1284 (4th Cir., 1975); *United States v. Briddle*, 436 F.2d 4, 6-7 (8th Cir., 1970); *United States v. Smith, supra*) and others on the ground that articulable facts existed to support the belief that evidence would be removed or destroyed (e.g., *United States v. McLaughlin*, 525 F.2d 517, 521 (9th Cir., 1976); *United States v. Spanier*, 597 F.2d 139 (9th Cir., 1977). But, despite these distinctions, it appears that the various circuits have adopted a different approach to the proposed "protective sweep" doctrine, and that an unwarranted incursion upon the warrant requirement of the Fourth Amendment may be on the verge of gaining acceptance.

The Government's invitation to create an exception to, and limitation on, Fourth Amendment safeguards in the interests of convenience to law enforcement officers is consistent with other constitutional shortcuts which have in recent years been urged with increasing earnestness upon our courts. Within the last few terms, this Court has been invited repeatedly to limit or relax the probable cause and warrant requirements of the Fourth Amendment. E.g., *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Michigan v. Tyler, supra; Mincey v. Arizona*, 437 U.S. 385 (1978); *Dunaway v. New York*, 442 U.S. 200 (1979); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *Payton v. New York*, 445 U.S. 573 (1980); and, most recently, *Michigan v. Summers, supra*. In each of these cases, the competing concerns were identical. The formal requirements of probable cause or

the necessity of obtaining a warrant were decried as anachronistic and unduly burdensome, as procedural loopholes for the guilty, as traps for the unwary police officer, and as impediments to effective law enforcement. And, in each case, this Court has unequivocally reaffirmed the fundamental importance of the Fourth Amendment requirements and of their scrupulous application.

Perhaps none of these recent cases more plainly establishes the constitutional infirmity of the Government's proposed "protective sweep" exception than *Ybarra v. Illinois*. There, this Court rejected the contention that exigent circumstances justified the routine but limited pat-down search of all those present on premises being searched pursuant to warrant where the officers did not have a reasonable belief that the particular person to be searched was armed and presently dangerous. Recognizing that *Terry v. Ohio*, 392 U.S. 1 (1968) created an exception to the requirement of probable cause, this Court emphasized the importance of maintaining the "narrow scope" of the exception, and declared that "Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons'. . . ." 444 U.S. at 93-94.

Petitioner submits that this holding unequivocally disposes of the Government's proffered justification for the warrantless entry in the instant case, and for "protective sweeps" in general. If the Fourth Amendment does not permit officers executing a valid search warrant in a bar known to be the scene of drug trafficking to make, for their own protection, the limited intrusion of a weapons frisk without specific articulable facts justifying a reason-

able belief in the need therefore, then clearly officers without a warrant cannot make the wholesale intrusion of a warrantless entry into an innocent third party's private business premises on the mere possibility that fugitives or dangerous criminals might be found inside.

II

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER COULD BE DENIED STANDING ON THE BASIS OF PRINCIPLES ESTABLISHED AFTER THE CONCLUSION OF PROCEEDINGS BELOW, AND IN RULING THAT PETITIONER HAD STANDING TO CHALLENGE THE LEGALITY OF A SEARCH PURSUANT TO WARRANT ON SOME GROUNDS BUT NOT OTHERS

During the District Court proceedings herein, no substantial challenge was raised to Petitioner's assertion of standing to object to the search of her purse pursuant to a warrant to search the entire premises of the Bay Area Auto Repair Shop. Rather, the Government appeared to concede Petitioner's right to object to the search of the purse, but challenged only her right to object to other searches and seizures in the premises. This was appropriate because Petitioner had asserted standing by virtue of an undisputed possessory interest in the purse and its contents. Under *Rakas v. Illinois,* 439 U.S. 128 (1978), Petitioner's demonstration of standing had clearly been sufficient. *Rakas* required only that defendant establish a violation of "personal rights," 439 U.S. at 133, 139-40. In applying that principle, the facts of *Rakas* itself necessitated a consideration of whether one who was legitimately

on the premises without a proprietary interest in them had such a personal right sufficient to assert the violation of his own privacy interest. But in discussing that interest, this Court at the same time made clear that, notwithstanding his or her relationship to the premises themselves, one who actually owned the property seized was thereby possessed of a sufficient privacy interest to permit the assertion of Fourth Amendment rights. The Court made this clear repeatedly.

At the outset of the opinion, the Court reiterated that the defendants had not only failed to assert an interest in the automobile that was searched, but had not "assert[ed] that they owned the rifle or the shells seized." 439 U.S. 130, 131, and 131, fn.1, further stating that "because of their failure to assert ownership, we must assume for purposes of our review that petitioners do not own the rifle or the shells." 439 U.S. 131, fn. 1. In discussing the different holdings in two prior cases, the Court noted that standing had been found because of possessory interest both in the premises and in the items seized, without any implication that either ground alone would not have sufficed. 439 U.S. at 136. Again, in rejecting the idea that mere legitimate presence on the premises without more could suffice to establish standing, the Court specifically noted "this is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property was seized during the search." 439 U.S. at 142, fn. 11. The Court reiterated that defendants in *Rakas* had not asserted a property interest in the automobile or the property seized (439 U.S. at 148), and again distinguished an

apparently conflicting holding in *Rios v. United States,* 364 U.S. 253 (1960) by noting that "the question of Rios's right to contest the search was not presented to or addressed by the Court *and the property seized appears to have belonged to Rios.*" 439 U.S. at 149, fn. 16, emphasis added.

Throughout, and particularly in its distinction of *Rios,* the Court clearly implied that a possessory interest in the items alone established standing to contest the search of the premises as a whole. Thus, nothing in *Rakas* suggested any infirmity in Petitioner's assertion of standing herein. It was only after the decisions in *United States v. Salvucci, supra,* and *Rawlings v. Kentucky, supra,* that a challenge to its sufficiency was suggested to the prosecution, and it was only upon appeal that the challenge was made. Even so, the Government's suggestion of this issue on appeal was consigned to a footnote reference, perhaps because the Government itself realized that the decisions were not rendered until June 15, 1980, a month after the filing of the District Court opinion denying Petitioner's motion to suppress herein.

Ironically, the Government itself described *Rawlings* as the case which "made clear" for the first time that no legitimate expectation of privacy could be based on a claim of ownership of the seized item alone. Clearly, this was tantamount to a concession that Petitioner's assertion of standing by virtue of ownership was legally sufficient at the time it was made and only later was declared insufficient.

The Court of Appeals purported to rely not only on *Rawlings* and *Salvucci*, but also on *Rakas v. Illinois, supra*, and *Brown v. United States*, 411 U.S. 223, 229 (1973). In so doing the Court erred since, as noted above, those cases offer no support for the challenge to Petitioner's demonstration of standing.

Thus, Petitioner should not have been foreclosed on the ground of lack of standing from objecting to the seizure and search of her purse. In the first place, a review of the record fairly reveals that the Government did not properly raise the issue below. Accordingly, at the least, a remand is required to permit Petitioner to make her record. Cf., *Combs v. United States*, 408 U.S. 224 (1972).

But even if it were determined that the Government did properly raise the issue below, it appears that Petitioner's demonstration of standing was clearly sufficient when made, and became arguably insufficient only under subsequent change in the law. *United States v. Salvucci* itself thus requires that the case be remanded so that Appellant may make an appropriate showing under the current state of the law. See also, *Combs v. United States, supra*, 408 U.S. at 227.

Additionally, Petitioner submits that the Court of Appeals' disposition of the standing issue creates an untenable anomaly, in attempting to isolate not the searches to which a defendant may object, but the grounds upon which he or she may object thereto. Both the Government and the Court itself appeared to concede that the Petitioner had standing to challenge the validity of the search warrant pursuant to which her purse was searched on the

ground that it lacked probable cause. No reason in logic or law appears to justify the anomalous conclusion that she may not challenge the same warrant on the ground that its probable cause resulted from an illegal entry into the very premises searched.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Dated: October 14, 1981

Respectfully submitted,

DORON WEINBERG
Counsel for Petitioner

(Appendices follow)

APPENDIX

Appendix A

United States Court of Appeals
For the Ninth Circuit

Nos. 80-1304 & 80-1475

D.C. No. 80-0017-SAW

United States of America,
Plaintiff-Appellee,

vs.

James Ezekiel Brandes and Linda Hill Walton,
Defendants-Appellants.

Argued and Submitted—April 15, 1981

Decided—July 15, 1981

Rehearing Denied August 17, 1981

Appeal from the United States District Court
For the Northern District of California
Richard Bilby, District Judge, Presiding
Stanley A. Weigel, District Judge, Presiding

MEMORANDUM

Before: TUTTLE,* SCHROEDER and POOLE, Circuit Judges.

The appellant Linda Hill Walton was convicted of one count of aiding and abetting a fugitive or felon in receipt of firearms in violation of 18 U.S.C. § 922(h). Appellant James Ezekiel Brandes was convicted of two counts of

*Honorable Elbert Parr Tuttle, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

possession of unregistered firearms in violation of 26 U.S.C. § 5861(b). We affirm the conviction of Linda Walton, but reverse Brandes' conviction because of insufficient evidence.

Linda Walton's case was tried to the court on the basis of stipulated facts. Appellant Walton's husband, Sergey Walton, and appellant Brandes, both fugitives from justice, were arrested in an automotive repair garage in Fremont, California, owned by Wayne Smelser. Appellant Brandes was discovered hiding in the garage during a warrantless sweep search of the building, and a subsequent warrantless entry by police officers revealed a hand grenade lying on the floor of the garage. The officers then obtained a warrant for a search of the building for firearms, and during the course of that search, the officers found and opened Linda Walton's purse. The purse contained receipts for her purchase of an Ingram 45 caliber weapon and an Ingram .380 caliber weapon together with ammunition. The make and caliber of each weapon was the same as two unregistered firearms found in the garage. The purse also contained a key to her husband's car which in turn contained ammunition for one of the weapons' and a briefcase specially modified to carry that type weapon. The serial numbers of the guns in the garage were obliterated and the weapons had been modified as fully automatic machine guns.

In an effort to show that the weapons which she purchased were not the same as the weapons found at the garage, Linda Walton produced two weapons which were inscribed with the same serial numbers as the weapons which she had purchased. However, expert testimony estab-

lished that the serial numbers were counterfeit. Thus the weapons which she produced were not the same as the weapons which she had purchased. Resolving, as we must, all reasonable inferences from the facts in favor of the government, *Glasser v. United States,* 315 U.S. 60, 80 (1942), we must reject Linda Walton's contention that the evidence was insufficient to support the trial court's verdict. The trial court could reasonably have concluded that Linda Walton purchased weapons for use by her fugitive husband. *Jackson v. Virginia,* 443 U.S. 307, 325 (1979).

Linda Walton contends that the affidavit for the search warrant for Smelser's garage, in which the police found and searched her purse, did not establish probable cause to search for other explosives. After seeing the hand grenade in plain view, in conjunction with information about Brandes and Sergey Walton, the police had probable cause to search for other explosives. Linda Walton's purse might have contained ammunition or other weapons. Reading the affidavit in a "common sense and realistic fashion," *United States v. Ventresca,* 380 U.S. 102, 109 (1965), the district court did not clearly err in upholding the magistrate's decision to issue the search warrant. *See United States v. Wysong,* 528 F.2d 345, 348 (9th Cir. 1976) (clearly erroneous rule applicable to district court findings concerning all aspects of legality of search on motion to suppress).

Appellant Walton also attacks the legality of the original "sweep search" of the garage and the follow-up search which led to the discovery of the grenade. These searches were, however, of premises owned by Smelser. Linda Walton demonstrated no expectation of privacy in them and the trial court properly found that she lacked standing

to challenge the warrantless searches of the garage. *Rakas v. Illinois*, 439 U.S. 128 (1978); *Brown v. United States*, 411 U.S. 223, 229 (1973); *United States v. Cella*, 568 F.2d 1266, 1280-82 (9th Cir. 1977). *See also United States v. Salvucci*, 448 U.S. 83 (1980) and *Rawlings v. Kentucky*, 448 U.S. 98 (1980).

Brandes appeals his conviction of possession of two Ingram machine guns on several grounds, but we need address only the sufficiency of the evidence.

Brandes, who was named on the same warrant as Sergey Walton and was known to have been a close companion of Walton's, was discovered hiding in a locked trailer parked inside the garage and was arrested. Also in the garage was a jeep belonging to Mr. Walton which contained a legal air rifle and a siren allegedly belonging to Brandes The two machine guns were found hidden under a work bench in the garage.

The question is whether there was sufficient evidence to link Brandes to the weapons found in the garage. In addition to the facts cited above, the evidence upon which the government relies is that Brandes was found in the same building with the weapons; that he was a fugitive with an inherent motive to possess a gun; that he was a long time associate of Walton, to whom the weapons were much more strongly linked; and that, in the two hour period between the government's discovery of Walton and its discovery of Brandes in the building, Brandes had the opportunity to hide the weapons. Even when viewed in the light most favorable to the government, the evidence establishes no more than proximity to the weapons and association

with one who did possess them. That, along with an alleged motive to possess a gun because he was a fugitive, is not sufficient to show constructive possession. *United States v. Anderson*, 453 F.2d 174, 178 (9th Cir. 1971); *Arellanes v. United States*, 302 F.2d 603 (9th Cir.), *cert. denied*, 371 U.S. 930 (1962). As we stated in *Arellanes*, "[M]ere proximity to the [contraband], mere presence on the property where it is located, or mere association, without more, with the person who does control the [contraband] or the property on which it is found, is sufficient to support a finding of possession." *Id.* at 606 (footnotes omitted).

On appeal the government has argued that, since a person could use only one weapon at a time, and since two men were discovered in a building containing two weapons, each of the individuals must have possessed one weapon. This theory, however, is pure speculation and is inconsistent with the jury verdict that both men were guilty of possessing both weapons.[1]

In short, we believe that both the judge in denying Brandes' Rule 29 motion for acquittal and the jury mistakenly placed too much weight on Brandes' close association with Walton. Guilt by association, along with the other ambiguous circumstantial evidence, is insufficient as a matter of law to support Brandes' conviction. *Ramirez v. United States*, 363 F.2d 33, 34 (9th Cir. 1966).

The conviction of Linda Walton is affirmed and the conviction of James Brandes is reversed.

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[1]Sergey Walton's appeal of his conviction was dismissed by order dated April 15, 1981.

Appendix B

In the United States Court of Appeals
For the Ninth Circuit

80-1475

United States of America,
Plaintiff-Appellee,

vs.

Linda Hill Walton,
Defendant-Appellant.

[Filed Aug. 17, 1981]

ORDER

Before: Tuttle*, Schroeder and Poole, Circuit Judges

The panel as constituted in this case has voted to deny the petition for rehearing.

*Honorable Elbert Parr Tuttle, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.